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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re N.B., et al., Persons Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. WILLIAM B., et al., Defendants and Appellants.	A121619 (Alameda County Super. Ct. Nos. OJ07006521, OJ07006522)

The juvenile court terminated the parental rights of appellant Guadalupe M. to her minor daughters N.B. and D.M. The parental rights of N.B.'s alleged father—appellant William B.—were also terminated. Both parents appeal,[1] challenging inter alia the juvenile court's finding that the minors are likely to be adopted. (See Welf. & Inst. Code,[2] § 366.26, subd. (c)(1).) We reverse the orders terminating parental rights and remand for a new hearing on adoptability.

[1] William and Guadalupe each filed timely notices of appeal from the orders terminating their parental rights. (See Cal. Rules of Court, rule 8.400(d)(1).)

[2] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

I. FACTS

In October 2003, N.B. was born to appellants Guadalupe M. and presumed father William B. The child was born with a condition affecting her vocal chords. This problem made it difficult for her to speak. N.B. also had problems with her eyes. After parting with Guadalupe, William took custody of N.B. when he determined that the mother was unable to take proper care of the child. N.B. lived with William until he was arrested in October 2005 on a weapons charge. The child was then returned to Guadalupe's care.

In June 2006, Guadalupe gave birth to a second daughter, D.M.[3] The two minors lived with Guadalupe. During this year, N.B. had a speech evaluation. Her speech problems made it difficult for her to communicate. Although it was thought that speech therapy could benefit the child, Guadalupe failed to take N.B. to many speech therapist appointments.

In March 2007,[4] authorities received a report that N.B. and D.M. had been left in the care of Guadalupe's mother. The minors were detained and placed in a foster home. Respondent Alameda County Social Services Agency petitioned the juvenile court to take jurisdiction over the two minors, alleging that the parents had failed to protect the minors and had provided no support for them. (§ 300, subds. (b), (g).) The petition alleged that Guadalupe had a history of methamphetamine use and lived a transient lifestyle. Two weeks earlier, the minors' grandmother had taken the girls into her care after finding them naked, dirty and hungry at Guadalupe's home. There had been no food for the children in Guadalupe's home, N.B. appeared to have lost weight since the grandmother's last visit, and Guadalupe had failed to attend to the

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[3] Alejandro R. is the alleged father of D.M. In April 2007, the juvenile court ordered that services need not be provided to him. His whereabouts were unknown until the winter of 2008, when he was incarcerated in Santa Rita jail. He opined that he was the father of D.M., but offered no proof of paternity. His parental rights were terminated in May 2008. He is not a party to this appeal.

[4] All subsequent dates refer to the 2007 calendar year unless otherwise indicated.

minors' medical care. Guadalupe had not taken N.B. to speech therapy and had failed to follow up on a doctor's suggestion that the minor might need eye surgery.

The petition also alleged that the whereabouts of Guadalupe and William were unknown. The agency believed that William was being detained by the federal Immigration and Naturalization Service. The juvenile court approved the minors' detention.

By early April, Guadalupe had been located. She expressed a willingness to enter a residential drug treatment program. On April 10, she was arrested on charges of possession of a controlled substance. The agency had also located William, finding him in a San Diego correctional facility. A citizen of El Salvador, William was being held there under the auspices of the federal Department of Homeland Security. On April 20, an amended petition was filed, adding the allegation that William was incarcerated and unable to provide for N.B.

Three-year-old N.B. displayed some serious emotional problems. At night after the foster family was asleep, she would walk around the house and open the doors. Once, she removed the contents of the refrigerator, placed them on the floor, and went to sleep nearby. She was receiving her medical care through a multidisciplinary program for vulnerable dependent children at risk for attachment problems and developmental delays. (See <http://www.alamedasocialservices.org/public/services/children_and_family/adoption/seed.cfm>.) N.B. became anxious when D.M. was out of sight.

The agency recommended that both minors be placed out of the home and that reunification services be provided for Guadalupe and William. N.B. was still deeply attached to D.M. A clinician determined that she would suffer extreme emotional trauma if separated from the baby.

On April 23, the juvenile court found the allegations of the petition to be true. It concluded that N.B. and D.M. were minors within the jurisdiction of the juvenile court. Reunification services were ordered for Guadalupe and William. The juvenile court continued the minors' foster care placement.

In June, Guadalupe was arrested for stealing a car and served six weeks in Santa Rita jail during the summer. In August, Guadalupe stopped using drugs and entered an inpatient substance abuse treatment facility in Modesto. By October, William faced unresolved criminal charges and imminent deportation to El Salvador.

At this point, D.M. was in good health and displayed no developmental issues. N.B. had several medical difficulties and was being closely monitored by several specialists. She received regular treatment for asthma and frequent urinary tract infections. She was very small for her age. N.B. was only minimally verbal and was difficult to understand. She displayed a lack of trust in others and acted as a parent to D.M., insisting on sleeping near her sister. N.B. had significant delays in speech and language, social and interpersonal matters, and fine motor skills. She was scheduled to begin speech therapy in October. N.B. also received weekly therapy for her mental health issues, primarily attachment and parentified behavior.

N.B. and D.M. had not securely attached to their foster family, even after seven months in that home. The foster mother characterized N.B. as "needy," complaining that she whined and cried a lot while constantly seeking attention from adults. The foster parents wanted to adopt D.M., but not N.B. The agency was unable to place the children in the home of Guadalupe's mother. It recommended that N.B. and D.M. be placed together in a new home. An adoption assessment was conducted and the minors were found to be adoptable. However, because Guadalupe was working toward reunification with the minors, the agency did not recommend adoption as the appropriate plan for them. (See § 366.21, subd. (i)(1).)

In October, the agency recommended that Guadalupe be given another six months of reunification services and that William's reunification services be terminated. A six-month review hearing began on October 10. At that time, Guadalupe had been terminated from her substance abuse program after she engaged in inappropriate behavior with the 16-year-old son of another resident. William's criminal and immigration status issues were still pending. His mother sought to have N.B. placed with her, but not D.M. She rejected the agency's concern that it would

be emotionally detrimental to N.B. to be parted from D.M. The review hearing was continued until October 24.

By October 24, the agency recommended that both parents' reunification services be terminated and that the matter be set for a permanency planning hearing to terminate their parental rights. Guadalupe's counsel and William's counsel—acting on behalf of the absent father—opposed this recommendation and a contested review hearing was set for January 2008.

In November, Guadalupe admitted herself to another inpatient substance abuse treatment program after a brief relapse with alcohol and missing two drug random tests. After she entered the program, she began to experience auditory hallucinations and was being treated with psychotropic medication. She underwent a comprehensive psychological evaluation, resulting in a diagnosis of major depression with psychotic features. The evaluator opined that Guadalupe was not emotionally ready for the responsibility of caring for her daughters. William was released from the San Diego correctional facility in late November and was soon deported to El Salvador.

In November, N.B. still had ongoing medical, speech and emotional issues. The minors were thought to lack a secure attachment to their foster parents. A therapist recommended that N.B. and D.M. be placed together in a different foster family with an adult to whom they could form an attachment.

In January 2008, the agency again recommended termination of reunification services and asked the court to free the minors for adoption. A new placement for both minors had been located, which the juvenile court approved. After another hearing later that month, the juvenile court terminated the parents' reunification services.

In February 2008, the juvenile court agreed that a permanent plan of adoption for N.B. and D.M. was appropriate. A May 2008 hearing date was set for a permanency planning hearing. (See § 366.26.) In March 2008, Guadalupe

voluntarily left her inpatient substance abuse treatment program and soon enrolled herself in an outpatient treatment program.

At age four, N.B. was still small for her age and continued to have medical and developmental issues that her new foster parents were attempting to have addressed. She had yet to be assessed by the local school district for speech and language delays. She continued to be monitored by medical professionals for asthma, repeated urinary tract infections and night bedwetting. N.B. had also been referred for genetics testing because of her small stature. She had developed cold sores on her mouth and was being treated for this condition. In April 2008, she began wearing glasses to correct her eye problem. She was more at ease in her new home, showing signs of attachment to her foster parents. Two-year-old D.M. had an upper respiratory infection that required antibiotics, but was otherwise healthy and developmentally on target.

In April 2008, a second adoption assessment was conducted and, again, it was determined that both minors were adoptable, based in large part on the fact that the foster family with which they had been placed was willing to adopt them.[5] (§ 366.21, subd. (i)(1).) The agency recommended that both siblings be placed together, given their deeply connected relationship. In April 2008, the juvenile court formally adopted a permanent plan of adoption for N.B. and D.M.

Meanwhile, health problems arose in the extended family of the foster parents with which the minors had lived since the beginning of 2008. The foster parents advised the agency that they might seek some respite care for the girls. By late April or early May 2008, the foster parents decided not to adopt N.B. and D.M. and sought to have the girls placed in another home. That decision was unrelated to the minors and if these family issues had not arisen, the agency expected that these foster

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[5] The juvenile court relied on this adoption assessment to make its finding of adoptability, but the assessment was not part of the record on appeal. We sought a copy of the assessment, which we have obtained. We take judicial notice of this assessment. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a)(1).)

parents would have adopted the girls. The agency began to search for a new foster family for N.B. and D.M.

In May 2008, the agency prepared a report for the juvenile court in advance of the permanency planning hearing. It reported that N.B. had made significant progress with some of her mental health issues, becoming less anxious, more trusting of adults and less parentified with regard to D.M. The agency report stated that her medical and developmental issues were unchanged since the last report in April 2008—she still had numerous medical conditions that were being monitored and treated including asthma, urinary tract infections, bedwetting, eye problems and cold sores on her mouth. Genetics testing and the school district's developmental assessments had yet to be conducted. However, the agency did not anticipate difficulty placing the minors as a sibling group, reporting that multiple homes were available for N.B. and D.M. and that a matching process was underway to find a suitable home for the two girls.

On May 14, 2008, the juvenile court conducted the permanency planning hearing. (§ 366.26.) Guadalupe objected to the proposed finding that the minors were likely to be adopted, noting that there was no identified adoptive home, no home study had been conducted and the children were not yet in an adoptive home. The agency noted that there was an approved home study placement of the minors, who were expected to move there a few days later. William argued that there was no clear and convincing evidence that N.B. was adoptable. He joined Guadalupe's objection that no adoptive study had yet been conducted for their new placement home. Guadalupe and William sought a continuance of the permanency planning hearing, citing uncertainty about whether the new foster parents would commit to adopting the minors once the minors were in the home.

Based on the agency's representations and the documentation it had provided, the juvenile court conducted the permanency planning hearing. The child welfare worker testified that two weeks earlier, an adoptive home had been identified. An adoption home study had been reviewed. The parents had been approved to adopt

and the worker met with the family for a lengthy report about the minors' history. The child's therapist had spent four hours with these parents. The family had had four visits with the minors—several day visits and one overnight visit during a two-week period. The children were expected to be placed with this family in several days' time. The parents assured the worker that they are willing to commit to adoption. They had expressed no concerns about adopting the minors and the child welfare worker did not believe that they would change their minds about this.

William and Guadalupe both argued that the agency's evidence of adoptability did not establish adoptability by clear and convincing evidence. The juvenile court considered the agency's report, the adoption assessment and the testimony offered at the hearing. At the close of that hearing, the juvenile court found by clear and convincing evidence that N.B. and D.M. were likely to be adopted, over the objections of Guadalupe and William. It terminated the parental rights of both Guadalupe and William.

II. ADOPTABILITY

A. *Standard of Review*

On appeal, William and Guadalupe both contend that the juvenile court erred in terminating their parental rights because there was insufficient evidence to support its finding by clear and convincing evidence that the children are adoptable. Both parents challenge the sufficiency of evidence to support the juvenile court's finding of general adoptability. They cite the fact that the minors were more difficult to place because they were to be adopted as a sibling group; the history of two failed placements; and N.B.'s numerous medical, emotional and developmental issues as evidence that the minors are not generally adoptable.

A juvenile court may terminate parental rights and order a child placed for adoption only if it finds by clear and convincing evidence that the minor is likely to be adopted. (§ 366.26, subd. (c)(1); *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254, cert. den. *sub nom. Dobles v. San Diego Department of Social Services* (1994) 510 U.S. 1178.) This finding provides some assurance that termination of

parental rights will not render the child a legal orphan. (See *Cynthia D. v. Superior Court, supra,* 5 Cal.4th at p. 252; *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1062 [special adoptability case; child requiring intensive care for life].) In determining whether a minor is adoptable, the juvenile court focuses on the child—typically, on whether the child's age, physical condition and emotional state make it difficult to find a person willing to adopt the minor. (*In re Zeth S.* (2003) 31 Cal.4th 396, 406; *In re Valerie W.* (2008) 162 Cal.App.4th 1, 13; *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) It is not necessary that the minor already be placed in a preadoptive home, but there must be convincing evidence that it is likely that adoption will occur within a reasonable time. (§ 366.26, subd. (c)(1); *In re Brian P.* (2002) 99 Cal.App.4th 616, 624; *In re Sarah M., supra,* 22 Cal.App.4th at p. 1649.) In the juvenile court, the agency has the burden of proof of adoptability. (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 731; *In re Brian P., supra,* 99 Cal.App.4th at p. 623.) In the case before us, the juvenile court found by clear and convincing evidence that both N.B. and D.M. were generally adoptable.

Guadalupe and William both challenge the juvenile court's finding that N.B. was generally adoptable. Guadalupe also challenges the finding that D.M. was generally adoptable. On appeal from an order terminating parental rights, we must determine whether there was substantial evidence from which the juvenile court could find clear and convincing evidence that the minors were likely to be adopted within a reasonable time. (*In re Valerie W., supra,* 162 Cal.App.4th at p. 13; *In re Brian P., supra,* 99 Cal.App.4th at pp. 623-624; see *In re Angelia P.* (1981) 28 Cal.3d 908, 924.) The clear and convincing evidence standard requires a high finding of probability. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205; see *In re Brian P., supra,* 99 Cal.App.4th at p. 624.) The evidence must be strong enough to command the unhesitating assent of every reasonable mind. (*In re Valerie W., supra,* 162 Cal.App.4th at p. 13; *In re Jerome D., supra,* 84 Cal.App.4th at p. 1205.) When we review the finding of adoptability, we consider the whole record, giving the juvenile court the benefit of every reasonable inference and resolving any evidentiary

conflicts in favor of the judgment. (*In re Valerie W., supra,* 162 Cal.App.4th at p. 13; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

B. *Sufficiency of Evidence*

The general issue of adoptability focuses on the likelihood that *the child* will be adopted, making the general suitability of a potential adoptive family irrelevant. (*In re Scott M.* (1993) 13 Cal.App.4th 839, 844; see *In re Brian P., supra*, 99 Cal.App.4th at p. 624.) In the case before us, the juvenile court found—based on the April 2008 adoption assessment and other evidence—that N.B. and D.M. were generally adoptable.[6] We must determine if the evidence that the juvenile court relied on supports this finding. (See *In re Valerie W., supra,* 162 Cal.App.4th at p. 13; *In re Brian P., supra*, 99 Cal.App.4th at pp. 623-624.)

We begin with an analysis of the adoption assessment itself. It cited three factors about the children that are relevant to issue of adoptability. (See *In re Brian P., supra*, 99 Cal.App.4th at p. 624 [on appeal, we consider facts about child set out in adoption assessment].) First, it stated that N.B. and D.M. were to be placed together. Their status as a sibling group will not necessarily prevent potential families from expressing interest in adopting them, but it may make them more difficult to place for adoption. (See § 366.26, subd. (c)(3); *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 225.) As the separate issues of their adoptability are linked, this factor from the adoption assessment tends to run counter to a finding of adoptability for either N.B. or D.M.

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[6] The agency contends that the parents waived their right to challenge the sufficiency of the adoption assessment on whether genetic testing should have been done for N.B. Regardless of whether the parents may challenge the adoption assessment on appeal, we may evaluate and weigh the evidence it contains when the juvenile court expressly relied on it to find that the minors were adoptable.

Second, the adoption assessment noted in a cursory way that N.B. had special needs that were being addressed by several specialists.[7] A child's young age, good emotional and physical health, intellectual growth and ability to develop normal relationships all indicate adoptability. (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1562.) The record is clear that N.B. does not enjoy all of these advantages.

Courts have found—and we agree—that children with a variety of medical, emotional and behavioral problems can properly be found to be generally adoptable. (See, e.g., *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154 [behavioral problems]; *In re Brittany C.* (1999) 76 Cal.App.4th 847, 851-852 [hyperactive, special needs child with attention deficit disorder]; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1367 [neurological and physiological impairment]; *In re Jennilee T., supra,* 3 Cal.App.4th at pp. 224-225 [neurological disorder].) However, as with sibling placement, the fact that a child has special physical, emotional and developmental needs may make adoption more difficult. Thus, this factor cited in the adoption assessment does not tend to support a finding of adoptability.

The third relevant factor noted in the adoption assessment was that the girls had bonded well to the foster parents in the placement that had been made in January. At the time of the assessment, that family was willing to adopt them. It appears that this was a pivotal reason why the agency determined that the girls were generally adoptable. The fact that a prospective adoptive parent has been identified constitutes relevant evidence that a minor's age, physical condition, and mental state are not likely to dissuade a proper person from adopting the child. (*In re Gregory A., supra,* 126 Cal.App.4th at p. 1562; *In re Sarah M., supra,* 22 Cal.App.4th at pp. 1649-1650.) A prospective parent's willingness to adopt generally indicates that the minor is likely to be adopted within a reasonable time—either by the prospective adoptive

[7] These issues were fleshed out in various agency reports, on which the juvenile court also relied.

parent or by some other family. (*In re Gregory A., supra,* 126 Cal.App.4th at p. 1562; *In re Asia L.* (2003) 107 Cal.App.4th 498, 510.)

This aspect of the adoption assessment was the only aspect of it that tended to support a finding of adoptability. However, by the time that the juvenile court made its adoptability finding three weeks after the assessment was conducted, it knew that this family was no longer willing to adopt the girls, albeit for reasons that were unrelated to N.B. and D.M. This change of circumstance reduced the relevance of this aspect of the adoption assessment on the issue of adoptability.[8] While the assessment may be read to suggest that N.B. and D.M. have the emotional capacity to bond with an adoptive family, that evidence alone—in the face of N.B.'s past attachment and bonding difficulties and the necessity to bond with yet another adoptive family—cannot be said to rise to the level of convincing evidence that N.B. and D.M. were likely to be adopted in a reasonable time. (See § 366.26, subd. (c)(1); *In re Brian P., supra,* 99 Cal.App.4th at p. 624; *In re Sarah M., supra,* 22 Cal.App.4th at pp. 1649-1650.)

Having found the April 2008 adoption assessment to provide only weak evidence in support of a finding of the minors' adoptability, we look to the other evidence considered by the juvenile court, which we find was not strong, either. The social worker testified that she believed that the girls were adoptable and would be placed in the home into which it was planned that they would move a few days after the hearing. However, a social worker's opinion of adoptability alone, without any reliance on underlying facts, is not sufficient to support the challenged finding. (*In re Brian P., supra,* 99 Cal.App.4th at p. 624.)

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[8] The fact that a child is not yet placed in a preadoptive home does not constitute a basis for concluding that it is not likely that the child will be adopted. (§ 366.26, subd. (c)(1).) However, when an adoption assessment relies on evidence that minors *have been* placed in an adoptive home as evidence that they are likely to be adopted, but that circumstance is no longer accurate at the time of the adoptability finding, then this aspect of the adoption assessment does not support a finding of adoptability, in the absence of other evidence that is not in the record on appeal.

The agency's written reports did not tend to support a finding of general adoptability, either. They noted N.B.'s ongoing special needs in some detail, but also suggested that some issues were not yet fully understood, because developmental testing by the school district and genetic testing had not yet been completed.[9] The report and the social worker's testimony at the permanency planning hearing expressed the hope that the upcoming placement would prove to be an adoptive home for N.B. and D.M.

When we consider all the evidence before the juvenile court that tended to favor a finding of adoptability, that evidence is too slender to constitute a high probability that commands the unhesitating assent of every reasonable mind. (See, e.g., *In re Jerome D., supra,* 84 Cal.App.4th at p. 1205.) The agency did not meet its burden of proving clear and convincing evidence of adoptability. (*In re Thomas R., supra,* 145 Cal.App.4th at p. 731; *In re Brian P., supra,* 99 Cal.App.4th at p. 623.)

C. *Conclusion*

We are not concluding that N.B. and D.M. are unlikely ever to be adopted. We only find that there is insufficient evidence in the record on appeal to support the juvenile court's May 2008 finding that they are likely to be adopted within a reasonable time. As that finding was unsupported, we must reverse the orders terminating Guadalupe's and William's parental rights. (See § 366.26, subd. (c)(1).) We remand the matter to the juvenile court for a new hearing on the issue of adoptability, at which time that court—aided by a more detailed adoption assessment and new evidence that may have developed since the time of the May 2008

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[9] The social worker's testimony suggested that some of these ongoing problems had been resolved, but the facts cited in the report prepared for the permanency planning hearing support the conclusion that they had not. Opinion testimony is only as strong as the facts on which the opinion is based.

permanency planning hearing—may find clear and convincing evidence to support a general finding of the minors' adoptability.[10]

The orders terminating Guadalupe's and William's parental rights are reversed and the matter is remanded to the juvenile court for further proceedings not inconsistent with this opinion.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Sepulveda, J.

[10] In light of this conclusion, we need not address William's procedural challenges to the May 2008 hearing.